In the result I am of opinion that the contract is valid and the appellants entitled to repossession. That is sufficient for their purposes. I do not see how they can be entitled, as approved applicants, to the declarations in prayers 5 and 6. As a further consequence, the order of the learned Judge for the payment of the sum of $4,670.76 and interest cannot stand, because any such claim was really for damages, and in lieu thereof I think an appropriate order would be for damages at the rate of $50 per month from the date of respondent's entry into occupation until possession delivered to the appellants, with interest thereon from date of judgment at the rate of 6 per cent per annum. The respondent should be entitled to deduct from the total of such damages the first payment of $500 which he had made, and the monthly payments which had been credited to his account.

As to costs, I am unable to see any reason for the same to be taxed as between solicitor and client. On the other hand I think the appellants were justified to file this action in the High Court, and they should have their costs here and in the Court below to be taxed as between party and party.

Since the above judgment was written I have had the advantage of reading the judgment of the learned Chief Justice and I would respectfully express my complete agreement therewith.

Appeal allowed.

Solicitors: *Bannon & Bailey; R. R. Chelliah.*

CHEONG SIK KWAN v. PUBLIC PROSECUTOR

[C.A. (Thomson C.J., Smith and Ong JJ.) January 26, 1959]

[K.L. — F.M. Criminal Appeal No. 32 of 1958]

Criminal Law and Procedure — Criminal breach of trust by servant — Falsification of accounts — Series of operation — Whether single transaction — Joinder of charges — Illegality.

Penal Code, ss.408 and 477A — Series of operation — Whether single transaction.

Criminal Procedure Code (Cap.6), ss.153 (ii), 163, 164, 165 and 170.

Where charges are tried together in contravention of any provisions of the Criminal Procedure Code there is an illegality which cannot be cured, and any conviction had cannot be sustained. *Subramania Ayyar v. King-Emperor.* (1)

In this case the appellant was convicted for four offences of criminal breach of trust in contravention of section 408 and three offences of falsification of accounts in contravention of section 477A of the Penal Code.* The only ground of appeal was that the charges against the appellant were joined and tried together in contravention of the provisions of the Criminal Procedure Code and therefore by reason of the effect attributed to these provisions in the case of *Subramania Ayyar v. King-Emperor* (1) the convictions should be set aside.

Held: the whole series of operations on which the charges were based was in fact a single transaction. On the facts proved there was a settled purpose to cheat. In the circumstances of the case the appeal must be dismissed.

Cases referred to:—

(1) *Subramania Ayyar v. King-Emperor* 28 I.A. 257, P.C.

(2) *Babulal Choukhani v. Emperor* A.I.R. 1938 P.C. 130; 65 I.A. 158; 174 I.C. 1, P.C.

(3) *Lim Yean Leong v. Public Prosecutor* [1940] M.L.J. 272.

(4) *Emperor v. Datto Hanmant Shahapurkar* I.L.R. 30 Bom. 49.

(5) *Chin Choy v. Public Prosecutor* [1955] M.L.J. 236.

(6) *Bracegirdle v. Oxley* [1947] 1 K.B. 349, 358.

COURT OF APPEAL.

N. A. Marjoribanks for the appellant.

Harun bin Haji Idris (Federal Counsel) for the respondent.

Cur. Adv. Vult.

Thomson C.J. delivering the judgment of the Court: This appellant was convicted in the High Court at Ipoh on 28th October, 1958, for four offences of criminal breach of trust in contravention of section 408 of the Penal Code and three offences of falsification of accounts in contravention of section 477A. He was sentenced to terms of imprisonment amounting in all to four years. He has now appealed against his convictions and his sentences.

The only ground of appeal that has been argued before us is that the charges against the appellant were joined and tried together in contravention of the relevant provisions of the Criminal Procedure Code and that therefore by reason of the effect attributed to these provisions in the well known case of *Subramania Ayyar v. King-Emperor* (1) the convictions should be set aside.

On the view we have formed as to the question actually involved in the appeal and before considering the actual charges on which

* The charges appear at pp. 190, 191 of the report.

the appellant was tried it is desirable to consider the nature of the prosecution case.

Towards the end of 1957 it was discovered that in the books of the Hongkong and Shanghai Bank at Ipoh there was a very considerable discrepancy between the total amount of credit balances shown in the current accounts ledger and the credit balance in the general ledger. Investigations of this discrepancy, according to the prosecution, led to the results that between about the middle of January, 1955 and the end of October, 1956, sums amounting in all to at least $60,000 had been stolen. The thefts had been concealed by a series of ingenious operations in connection with the current amount with the Bank of the General Omnibus Company.

Briefly the alleged nature of these operations was as follows. When the company paid money into the Bank it was accompanied by a paying in slip made out in duplicate. In accordance with the usual practice of the Bank the money was checked with the paying in slip by the receiving shroff or cashier who then passed both copies of the paying in slip to a senior officer of the Bank who checked the copies with each other but not with the cash. One copy was then returned to the customer and the other copy was retained in the Bank for the purpose of posting the customer's account in the current accounts ledger. In the case of the present proceeds, however, before it could be posted it was removed and there was substituted for it a forged slip showing a very much smaller amount than that originally shown. The effect of this was that when at the end of the day the shroff had to account for the cash in his possession he was able to account for an amount which was less than he had in fact received by the difference between the amount of the genuine paying in slip and that of the forged one. The true state of affairs was kept for the time being from the notice of the customer by the substitution of fabricated monthly statements for the genuine ones prepared from the current accounts ledger and, again for the time being, was concealed from the higher officers of the Bank in the later stages by the suppression of cheques drawn by the customer and presented for clearance by other Banks.

It was the case for the prosecution that the operation relating to the falsification of the paying in slips was conducted on 11 occasions between 17th January, 1955 and 19th September, 1955, the total amounts involved being $45,000, that it was again conducted on 13th August, 1956 in respect of $5,000, on 3rd September, 1956, in respect of $5,000 and on 29th October, 1956, in respect of $5,000 and that on each occasion the shroff involved was the appellant. On each of these occasions the money paid in by the Company was received by the appellant who at all material times was employed by the Bank as a shroff and on each of these occasions the paying in slips were falsified by the appellant. On that and on the ultimate shortage in the Bank's funds it was said that the inference was clear and unavoidable that the appellant who at all material times was a servant of the Bank had stolen the money in question.

The case for the prosecution was supported at the trial by a great body of detailed evidence which it is not necessary to consider in detail here. It was found by the learned trial Judge to have been proved and his findings, with which in any event we agree, have not been attacked before us.

What has been attacked, and it has been attacked on purely technical grounds, is the way in which the matter was presented and dealt with at the trial.

The trial was not a summary one, a preliminary enquiry having been held by a Magistrate, and the charges were accordingly framed by the Public Prosecutor, presumably, in the light of the depositions. They read as follows:—

"(1) That you, between 17th January and 19th September, 1955, at the Hongkong and Shanghai Bank, Ipoh, in the State of Perak, being a servant in the employment of the said Bank and in such capacity entrusted with certain property, to wit, cash $45,000, committed criminal breach of trust in respect of the said property and that you have thereby committed an offence punishable under section 408 of the Penal Code;

(2) That you, on or about the 13th August, 1956, at the Hongkong and Shanghai Bank, Ipoh, in the State of Perak, being a servant in the employment of the said Bank and in such capacity entrusted with certain property, to wit, cash $5,000 committed breach of trust in respect of the said property and thereby committed an offence punishable under section 408 of the Penal Code;

(3) That you, on or about the 3rd September, 1956, at the Hongkong and Shanghai Bank, Ipoh, in the State of Perak, being a servant in the employment of the said Bank and in such capacity entrusted with certain property, to wit, cash $5,000 committed breach of trust in respect of the said property and that you have thereby committed an offence punishable under section 408 of the Penal Code;

(4) That you, on or about the 29th October, 1956, at the Hongkong and Shanghai Bank, Ipoh, in the State of Perak, being a servant in the employment of the said Bank and in such capacity entrusted with certain property, to wit, cash $5,000 committed breach of trust in respect of the said property and that you have

thereby committed an offence punishable under section 408 of the Penal Code;

(5) That you, on or about the 13th August, 1956, at the Hongkong and Shanghai Bank, Ipoh, in the State of Perak, being a clerk of the Hongkong and Shanghai Bank, wilfully and with intent to defraud falsified a certain draft, to wit, Cash Credit Slip from $5,791.20 to 791.20 which belonged to the General Omnibus Company, Ipoh, and that you have thereby committed an offence under section 477A of the Penal Code;

(6) That you, on or about the 3rd September, 1956, at the Hongkong and Shanghai Bank, Ipoh, in the State of Perak, being a clerk of the Hongkong and Shanghai Bank, wilfully and with intent to defraud falsified a certain draft, to wit, Cash Credit Slip from $6,350.90 to $1,350.90 which belonged to the General Omnibus Company, Ipoh, and that you have thereby committed an offence under section 477A of the Penal Code;

(7) That you, on or about the 29th October, 1956, at the Hongkong and Shanghai Bank, Ipoh, in the State of Perak, being a clerk of the Hongkong and Shanghai Bank, wilfully and with intent to defraud falsified a certain draft, to wit, Cash Credit Slip from $5,186.15 to $791.20 which belonged to the General Omnibus Company, Ipoh, and that you have thereby committed an offence under section 477A of the Penal Code."

It is not altogether clear why those charges should have been framed in the way they were framed, though one reason clearly was the limitation placed on "lump sum" charges in cases of misappropriation by section 153(ii) of the Criminal Procedure Code. In the event, however, the appellant was charged with and tried upon them all together and it is significant that no objection of any sort was taken to this course at any time by counsel for the defence. The question of whether the charges could indeed be tried together did, as would appear from his judgment, occur to the mind of the learned trial Judge, but on reflection he took the view that the case was covered by section 165(i) of the Criminal Procedure Code because the alleged offences were committed in a series of acts so connected together as to form the same transaction. He accordingly refrained from intervening and allowed the trial to proceed on that basis and in the event, as has been said, he found the appellant guilty on all charges.

As in the case of *Babulal v. Emperor* [2] it is not necessary to discuss here the precise scope of what was decided in the case of *Subramania Ayyar v. King-Emperor, supra,* but that case clearly did decide that where charges are tried together in contravention of any of the provisions of the Criminal Procedure Code there is an illegality which cannot be cured and that any convictions had cannot be sustained.

The provisions of the Code which are relevant here are contained in sections 163, 164, 165 and 170 corresponding to sections 233, 234, 235 and 239 of the Indian Code.

Section 163 provides that for every distinct offence of which any person is accused there shall be a separate charge and every such charge shall be tried separately, except in the cases mentioned in sections 164, 165, 166 and 170. That is a general mandatory provision which is only subject to the exceptions that are mentioned.

The first of these exceptions is contained in section 164, which provides that when a person is accused of more offences than one of the same kind committed within twelve months he may be charged with and tried at one trial for any number of them not exceeding three.

The second of these exceptions is contained in section 165, the material portion of which reads as follows:—

"If in one series of acts so connected together as to form the same transaction more offences than one are committed by the same person, he may be charged with and tried at one trial for every such offence."

The third exception is contained in section 166 but is not relevant to the present case.

The fourth exception is contained in section 170 which provides *inter alia* that when more persons than one are accused of 'different offences committed in the same transaction' they may be charged and tried together or separately as the Court thinks fit.

In the case of *Lim Yean Leong v. Public Prosecutor* [3] it was held by this Court that the exceptions mentioned in section 163 are cumulative and not mutually exclusive. That decision is of course binding on us. It should, however, be pointed out that it is in entire accordance with the judgment of the Privy Council in the case of *Babulal v. Emperor, supra,* the report of which probably was not available in Malaya when *Lim Yean Leong's* case was decided. In that case Their Lordships were concerned with section 239 of the Indian Code (our section 170). They dealt with it in relation to section 233 of the Indian Code (our section 163) as follows:—

"The clause is expressly an exception from section 233 and enables a plurality of offences to be dealt with in the same trial. But it does not import either expressly or by implication the limitation set out in section 234 according to which not more than three offences of the same kind committed within the space of 12 months can be tried together or the limitation contained in section 235(1), under which more offences than one committed by the same person can only be tried together if they are in one series of acts so connected together as to form the same transaction, in which case there is no specific limit of number. Nor is there any limit of number of offences specified in section 239(d). The one and only limitation there is that the accusation should be of offences 'committed in the course of the same transaction'."

Returning to the present case, the trial of the appellant on the charges on which he was tried was clearly forbidden by section 163 unless it fell within the cases mentioned in sections 164, 165, 166 or 170. It clearly did not fall within the case mentioned in section 164, for there were more than three alleged offences and they were not all committed within the space of 12 months. The only exception within which it could fall is that contained in section 165. The question, therefore, is whether the offences charged were committed "in one series of acts so connected together as to form the same transaction." If they were committed in the course of such a series of acts then section 164 has no application and it is immaterial whether or not the offences were more than three in number of whether or not they were committed within the space of 12 months.

The question of when a number of acts do or do not form the same transaction for the purposes of sections 235 and 239 of the Indian Criminal Procedure Code (our sections 165 and 170) has been considered by the Courts in India in a very large number of cases. It is not necessary to consider these cases here in detail because, apart from insisting on the presence of such elements as proximity of time and place continuity of action and unity of purpose and design, they are all agreed that the question is a question of fact to be decided upon the circumstances of each individual case. Moreover, though this is not of paramount importance in the present case, that question is not necessarily to be decided according to the eventual result of the trial but in the light of the accusation which led to the trial (see *Babulal v. Emperor, supra*). And in this connection it should be noted that it was said by Batty, J., in the case of *Emperor v. Datto Hanmant Shahapurkar,* [4] which was mentioned with approval by the Privy Council in *Babulal's* case, that what matters is the tenor of the accusation and not the wording of the charges and that it is not necessary that the charges and that it is not necessary that the transaction being the same.

In the present case the trial Judge took the view that the whole series of operations on which the charges were based was in fact a single transaction. He applied the test applied by this Court in the case of *Chin Choy v. Public Prosecutor* [5] that there must be a purpose or design which was something particular and definite and he found that that test was fulfilled. He took the view that there was a settled purpose to cheat the Bank by using one particular account as the means of putting that purpose into effect and that the repetition of the same technique month after month on every occasion when one of the frauds in the series was perpetrated was the clearest possible example of a single transaction springing from a single initial design.

For ourselves we agree with the views of the trial Judge. We are fortified in agreeing with them by our own study of the monthly statements sent to the customer and the relevant portions of the current accounts ledger kept in the Bank. These show that from beginning to end the necessary effect of the falsification of the paying in slips and latterly the suppression of cheques was to produce false balances in the current accounts ledger which were carried forward from day to day from before the beginning until after the end of the period covered by the charges. In our view this is more than an accidental circumstance. There is a strong element of casual connection between it and what might be called the main body of the fraud for if steps had not been taken to produce this state of affairs, this series of false balances which runs as an unbroken thread throughout the transaction, the defalcations would inevitably have been discovered at a very early stage either by the Bank or by the customer's accountants. In effect the production of this unbroken thread of falsehood was an essential part of the common purpose running throughout the whole series of defalcations for without it they could not have continued for much over a month without discovery.

We would add, however, that even if we were disposed not to agree with the trial Judge's conclusions on what is a question of fact we should not be justified in interfering with them unless there was no evidence to support them or unless we took the view that they could not reasonably be drawn from the evidence. As was said by Denning, J., in the case of *Bracegirdle v. Oxley* [6] the Court will only interfere if the conclusion cannot reasonably be drawn from the primary facts. Here there was ample evidence to support the trial Judge's conclusion and in our view it could not possibly be said that it was unreasonable.

In the circumstances then we dismiss the appeal against the convictions.

As regards the appeal against the sentences this was not very strongly pressed upon us and we would only observe that if the sentences erred at all they erred on the side of leniency.

Appeal dismissed.

Solicitors: *Lovelace & Hastings.*